STATE OF MICHIGAN

COURT OF APPEALS

TIM EDWARD BRUGGER II, Plaintiff-Appellee,	FOR PUBLICATION May 15, 2018 9:10 a.m.
v	No. 337394 Midland Circuit Court
MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS, Defendant-Appellant.	LC No. 15-002403-NO Advance Sheets Version

Before: SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ.

SHAPIRO, P.J.

Defendant, the Midland County Board of Road Commissioners, appeals the trial court's denial of its motion for summary disposition. Because plaintiff's presuit notice complied with the applicable statute, we affirm.

I. FACTS

Plaintiff, Tim E. Brugger II, was injured on April 27, 2013, when he lost control of his motorcycle and crashed. He filed suit against defendant, asserting that the crash was the result of large potholes and uneven pavement on a road maintained by the Midland County Road Commission. Governmental immunity does not shield a road commission from liability when it fails to maintain the road in a condition "reasonably safe and convenient for public travel." MCL 691.1402(1).

On August 15, 2013, 110 days after the crash, plaintiff served defendant with presuit notice in accordance with MCL 691.1404 of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. After suit was filed, the case progressed in typical fashion until this Court issued the decision in *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016). In *Streng*, *id*. at 462-463, the Court concluded that MCL 224.21(3) (a provision of the county road act), rather than MCL 691.1404, controlled the timing and content of a presuit notice directed to a road commission. Following that decision, defendant, relying on *Streng*, moved for summary disposition, arguing that plaintiff's presuit notice—filed within the 120 days as set forth in the GTLA—was ineffective because it was not filed within the 60-day limit set forth in the county road act.

The trial court denied the motion, concluding that *Streng* should be given prospective application because, for decades, parties and the courts had understood that the GTLA notice provision controlled. The trial court set forth its opinion from the bench, stating:

> From the Court's perspective, I find that the Supreme Court in Rowland[1] specifically indicated that the GTLA is the notice provision for which road commission cases are subject to being followed and it had done that consistent with a fairly significant long line of cases, two of which they overruled.
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> However, it was consistent as to what was the proper statutory provision in the Court's perspective is that it was the application of that provision that was found to be inapplicable and, therefore, stricken by the Supreme Court in Rowland.
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> So, therefore, the Court finds that the circumstances in this case are in compliance with the requirements of the GTLA. And, therefore, that it is—summary disposition on that basis is denied.
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> However, I will also indicate if the analysis is, in fact, inaccurate and Streng was correctly decided, . . . I will find that based upon the criteria that was announced in Bahutski[2] [sic] as well as the other case that was cited in Rowland that it is, in fact, to be applied prospectively, because there had been no indication that the differentiation was appropriate to provide notice to claimants that were coming forward.
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> And that it would—it would, in fact, result in manifest injustice to deny claims that had been in compliance with the agreed—with what had been agreed upon as the proper notice provision, but there was a change, from the Court's perspective, a change in the application of that interpretation by the Court of Appeals decision and that occurred after the notice had already been provided in this case.
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> And, therefore, the Court's . . . opinion [is that] it does not prevent the application of the GTLA provision of 691.1404.

Defendant appeals the trial court's ruling, arguing that plaintiff's failure to file a notice consistent with the requirements of the county road act mandates dismissal.

The question before us, therefore, is whether the decision in *Streng* should apply to all pending cases or only to those cases that arose after it was issued.

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[1] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

[2] Apparently, the trial court was referring to *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

II. ANALYSIS

This case presents a highly unusual circumstance. The Legislature has enacted two inconsistent statutes governing presuit notice to road commissions. The GTLA requires that notice be provided within 120 days of the injury. MCL 691.1404(1). In contrast, the county road act allows for a 60-day period. MCL 224.21(3). The statutes also vary somewhat regarding the required content of the notice.

In 1970, the Michigan Supreme Court held that the 60-day notice provision in MCL 224.21(3) violated due process as applied to an incapacitated individual. *Grubaugh v City of St. Johns*, 384 Mich 165, 176; 180 NW2d 778 (1970), abrogated by *Rowland v Nashtenaw Co Rd Comm*, 477 Mich 222; 731 NW2d 41 (2007). *Grubaugh* did not extend its conclusion to all claimants however, noting that was a question for another day. *Id*. at 176-177. In 1972, in *Reich v State Hwy Dep't*, 386 Mich 617, 623-624; 194 NW2d 700 (1972), abrogated by *Rowland*, 477 Mich 222, the Supreme Court held that then-extant 60-day notice provision in MCL 691.1404 was unconstitutional on its face because it violated the Equal Protection Clause by requiring governmental tortfeasors to be given notice when none was required for private tortfeasors.[3] *Reich* did not address MCL 224.21, but shortly after it was decided, we concluded in *Crook v Patterson*, 42 Mich App 241, 242; 201 NW2d 676 (1972), that the rationale in *Reich* applied to that statute as well, and this Court struck down the MCL 222.421(3) notice requirement as unconstitutional. *Crook* was not appealed, and we can find no reported case thereafter in which a court evaluated a claimant's notice of claim under MCL 224.21(3) until the decision in *Streng*.[4]

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[3] The constitutionality of the GTLA notice provision was again addressed in *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976). By the time that case was heard, the Legislature had amended MCL 691.1404 to provide for a 120-day notice period, see MCL 691.1404(1), as amended by 1970 PA 155, and the Supreme Court in *Carver v McKernan*, 390 Mich 96, 100; 211 NW2d 24 (1973), had upheld a 120-day notice provision in a different statute. In *Hobbs*, 398 Mich at 96, the Supreme Court overruled *Reich*'s absolute bar on notice provisions and held that the 120-day notice provision in MCL 691.1404(1) was constitutional when the government could show prejudice. In 1996, the Supreme Court decided *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), reiterating that the 120-day notice provision in the GTLA was constitutional if prejudice could be shown but that the 60-day notice provision in MCL 224.21 was unconstitutional. *Id*. at 363-364. Finally, in *Rowland*, 477 Mich at 200-201, the Supreme Court overruled *Hobbs* and *Brown* and held that the 120-day notice provision in the GTLA was constitutional and that no prejudice need be shown by the government when a claimant failed to satisfy that provision.

[4] *Rowland*, while overruling *Brown* and abrogating *Reich*, addressed only the GTLA notice-provision holding and made no mention of MCL 224.21(3) or *Crook*. It considered only whether the plaintiff had complied with the 120-day notice provision of the GTLA. With *Reich* abrogated, the *Crook* holding striking down MCL 224.21(3) was without support and was implicitly overruled. However, it was not explicitly overruled, which may explain why until

Thus, *Crook—decided 46 years ago*—was the last time that the viability of the presuit notice provision in MCL 224.21(3) was directly addressed. And since the *Crook* decision, our courts have routinely applied the 120-day notice requirement of the GTLA when a defendant is a county road commission without any discussion of MCL 224.21(3). See *Streng*, 315 Mich App at 460 n 4 (listing published and unpublished cases applying the GTLA notice provision in actions against county road commissions). As was stated in *Streng*, 315 Mich App at 463, "appellate courts appear to have overlooked the time limit, substantive requirements, and service procedures required by MCL 224.21(3) when the responsible body is a county road commission."

Plaintiff asks that we reject *Streng* and request a conflict panel under MCR 7.215(J)(2) and (3). We need not do so however because we can decide this case on other grounds. We conclude that *Streng* should be applied prospectively as it is at variance from what was understood to be the law for at least 40 years, and plaintiff's failure to comply with MCL 224.21(3) was the result of "the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005).

The rules governing retroactivity are found in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002). In *Pohutski*, the Michigan Supreme Court acknowledged the general rule that judicial decisions are given full retroactive effect. *Id*. at 695. However, "a more flexible approach is warranted when injustice might result from full retroactivity." *Id*. at 696. Such injustice may result where a holding overrules settled precedent. *Id*. There are three factors to be weighed in determining whether retroactive application is appropriate:

> (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. In the civil context, . . . this Court . . . recognized an additional threshold question whether the decision clearly established a new principle of law. [*Pohutski*, 465 Mich at 696 (citation omitted).]

We conclude that *Streng* should be given prospective-only application and that therefore, the 120-day notice provision of MCL 691.1404(1) is applicable to this case. Because our Supreme Court in *Rowland* did not explicitly overrule binding precedent that established the 120-day notice requirement of the GTLA as the governing provision in actions against county road commission defendants, and no case has been decided on the basis of MCL 224.21(3) for at least 46 years, we conclude that *Streng* effectively established a new rule of law departing from the longstanding application of MCL 691.1404(1) by Michigan courts. See *Streng*, 315 Mich App at 463; *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455, 463; 795 NW2d 797 (2010) (opinion by WEAVER, J.).

Turning to the three-part test, we first consider the purpose of the *Streng* holding, which was to correct an apparent error in interpreting a provision of the GTLA. As noted in *Pohutski*,

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Streng, the notice requirement in MCL 224.21(3) remained dormant, if not dead, in the eyes of bench and bar.

465 Mich at 697, this purpose is served by prospective application. Second, as previously discussed, there has been an extensive history of reliance on the 120-day GTLA notice provision, rather than MCL 224.21(3), in cases concerning county road commission defendants. The universal reliance on this decades-long history also weighs in favor of prospective application. Moreover, prospective application would minimize the effect of this sudden departure from established precedent on the administration of justice.

Also relevant is the fact that the confusion concerning the law was not created by plaintiff but, rather, by the Legislature and the Judiciary. The Legislature adopted two conflicting sets of requirements regarding the timing and content of the presuit notice. And for decades, the Judiciary has decided many presuit notice cases based on the requirements of the GTLA, with no reference to MCL 224.21(3). The role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith on the basis of the apparent law. For instance, in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 417; 684 NW2d 864 (2004), the plaintiff filed an action against the defendant healthcare provider sounding in ordinary negligence. The defendant argued that two of the plaintiff's claims sounded in medical malpractice and that those claims should therefore be dismissed because, although the action had been filed during the three-year limitations period for negligence cases, it had not been filed within the two-year limitations period for medical malpractice. *Id*. at 418. The Supreme Court concluded that the two counts in question sounded in medical malpractice and that "under ordinary circumstances [those counts] would be time-barred." *Id*. at 432. Nevertheless, it did not dismiss them because "[t]he equities of [the] case . . . compel a different result." *Id*. The Court went on to state:

> The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris*.[5] Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. MCR 7.316(A)(7). [*Bryant*, 471 Mich at 432.]

There can be no doubt that the "procedural circumstances" in the instant case are, as they were in *Bryant*, the result of "understandable confusion" resulting from conflicting actions by the Legislature and the Judiciary. Accordingly, like the Supreme Court in *Bryant*, we conclude that "plaintiff's . . . claims may proceed to trial . . . ." *Id*. As discussed, for decades the Judiciary applied the 120-day notice provision of MCL 691.1404(1) in actions against county road commission defendants. See *Streng*, 315 Mich App at 460 n 4. Plaintiff filed his presuit notice on August 15, 2013, more than two years and nine months before *Streng* was decided.

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[5] *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999).

Because we conclude that *Streng* applies only to actions arising on or after May 2, 2016, we affirm the trial court's denial of defendant's motion for summary disposition. As the prevailing party, plaintiff may tax costs under MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Michael J. Kelly